UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

UNIONTOOLS, INC. [1]/

Employer

and Case 9-RC-17961

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 89, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO [2]/

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Employer assembles various lawn and garden tools and operates a distribution warehouse at its Shepherdsville, Kentucky facility. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent essentially a unit consisting of the Employer's assembly and warehouse distribution employees at this facility. There is no history of collective bargaining affecting any of the employees involved in this proceeding.

The parties agree that a bargaining unit described as including assembly, distribution warehouse, inventory and quality control employees employed by the Employer at its Shepherdsville, Kentucky facility, but excluding office clerical employees, maintenance employees, employees employed through temporary agencies, and all professional employees, guards and supervisors as defined in the Act, is appropriate for the purposes of collective bargaining. At the time of the hearing, the unit described consisted of approximately 111 employees. In agreement with the parties, I conclude that this is an appropriate unit for collective bargaining and will direct an election among the employees in such Unit.

The primary issue over which the parties disagree is whether the petition should be dismissed because it is premature. The Employer asserts that the petition is premature because it plans to expand its employee complement in the near future to meet the needs of its busy season, and there is a high degree of employee turnover. As more fully explained below, because the

[1]/ The name of the Employer appears as amended at the hearing.

[2]/ The name of the Petitioner appears as amended at the hearing.

current employees comprise a substantial and representative complement of employees, I see no reason to delay an election and I will not dismiss the petition.

The parties also disagree as to whether the unit description should include "part-time" employees. Despite the fact that there are currently no part-time employees and no plans to employ part-time employees in the future, the Union, contrary to the Employer, nevertheless seeks the inclusion of part-time employees in the unit description. I conclude, as set forth in more detail below, that because there are no part-time employees, there is no basis for their inclusion in the unit description.

In reaching my determination on these issues, I have considered not only the arguments made by the parties at the hearing in this matter, but also those contained in the Employer's post hearing brief. [3]/ In explaining how I came to my determination on these issues, I will first set forth the background of the Employer's operations, employee complement and plans for the future. I will then analyze the issues in relation to the applicable legal precedent and articulate how I arrived at my decision.

II. BACKGROUND

The Employer manufactures lawn and garden implements such as shovels, rakes, pool care tools and hoses. The Employer operates two manufacturing facilities: one in Frankfurt, New York and the other in Shepherdsville, Kentucky. The forging of the metal heads of tools is performed in Frankfurt, while the assembly of tools is completed at the Shepherdsville facility which also incorporates a distribution warehouse. Although last year the Frankfurt plant did some assembly work, currently (and apparently for the foreseeable future) all assembly is done in Shepherdsville.

At the time of the hearing in this matter there were 111 unit employees, broken down by classification as follows:

Distribution warehouse	39
Quality control	5
Assembly	63
Inventory	4

In the past, the Employer has utilized temporary employees from staffing agencies. Currently, there are no such temporary employees working for the Employer. The record also reflects that the Employer generally has a very high rate of employee turnover.

The primary selling season for the Employer's products is spring and summer. Consequently, in preparation for the selling season, the busiest season of the assembly operations is January through May. As mentioned above, in addition to the workers which it directly employs, the Employer has utilized a number of "temporary" employees procured through

[3]/ The Petitioner did not file a brief.

staffing agencies whose length of employment is 30 to 90 days. For the upcoming busy season, the Employer forecasts that it will be hiring only an additional 17 full-time employees and 15 temporaries at its Shepherdsville facility. [4]/ This limited hiring is forecast even though, as noted by the Employer in its brief, the Employer utilized a considerably greater number of employees during last year's busy season and it is always conceivable that hiring may be done beyond its own forecast. It is anticipated that the new non-temporary employees will be placed in the distribution warehouse and assembly categories of employees.

The Employer does not plan on changing its operations concomitant with the hire of the new employees. For example, it is not tied to any new line of products and there are apparently no new types of machinery being installed. Non-temporary new hires will have the same pay structure and benefits as current employees.

III. ISSUE ANALYSIS AND DETERMINATION

A. Dismissal Issue:

Based upon the high degree of employee turnover, the increase in the number of workers it intends to hire for its busy season and the possibility that hiring may be done at some point during its busy season greater than that forecasted, the Employer argues that the petition in this case should be dismissed as premature. The Employer avers that the optimum time for filing a petition would be in January or February, followed by an election held in March or April. At that point any additional unforeseen hiring would be over. It also notes that due to turnover and new hiring, the work force that would exist at that time would constitute a substantially different group of employees and that these prospective employees' rights should be considered.

It is well settled that the Board will direct an immediate election, despite an employer's plans to expand its workforce, when the employer's current complement of employees is "substantial and representative" of the existing unit workforce. *Yellowstone International Mailing,* 332 NLRB 386 (2000). Among the factors the Board considers when making this determination are: the size of the current workforce; the size of the expected ultimate employee compliment; the time expected to elapse before a full workforce is attained; the number of existing and anticipated job classifications; and the certainty of the expansion. *Toto Industries, Inc*., 323 NLRB 645 (1997). The Board will generally find that an existing complement of employees is substantial and representative when "approximately 30 percent of the eventual employee complement is employed in 50 percent of the anticipated job classifications." *Yellowstone International Mailing,* supra at 386.

[4]/ The record is somewhat confusing on the composition and number of to-be-hired employees. The original figures presented at the hearing reflected a current work force (comprised of all non-temporary employees) of 111 employees, and an anticipated hiring of 35 new employees -- 20 non-temporary and 15 temporary. Later it was disclosed that the day before the hearing 3 new employees began work who oddly were included both in the current 111 employee figure and the 35 employees expected-to-be-hired figure. Although it was not specifically stated in the record that the three new employees were non-temporary, this logically flows from testimony indicating the 111 current employees are non-temporary. Therefore, this leaves 17 non-temporary employees yet to be hired.

For example, in *Yellowstone International Mailing*, the existing complement of employees constituted 38 percent of the projected workforce and 100 percent of the ultimate job classifications were filled. The Board found this workforce constituted a substantial and representative complement sufficient to proceed with an election. In *Toto Industries, Inc*., the Board agreed that an existing complement of over 50 percent of the anticipated employees was substantial and representative.

In the instant case, the Employer anticipates hiring 17 more unit employees before the end of December 2004. The Employer currently employs 111 unit employees. Thus, there will be an expansion of the Unit by only approximately 15 percent. Of the 111 current employees, 102 (or approximately 92 percent) are distribution and assembly employees - the categories of employees in which the new hires are expected to be placed. Consequently employees in the two classifications will increase collectively by less than 17 percent. No new job classifications will be added. Thus, the current complement of Unit employees constitutes 100 percent of the ultimate job classifications.

The evidence is clear that the Employer forecasts hiring only 17 additional unit employees. While nothing in life or business is certain, there are no current plans to hire any additional employees. It is well settled that the Board will not dismiss a petition based upon plans that are mere speculation or conjecture. See, e.g., *Trailmobile, Division of Pullman, Inc*., 221 NLRB 645 (1975); *Meramec Mining Co.,* 134 NLRB 1675, 1679-80 (1962); *General Engineering*, 123 NLRB 586, 589 (1959). [5]/

I note that certain exhibits in the record indicate that, although the Employer has a busy season, it maintains a substantial workforce throughout the year. If an employer, despite hiring some employees seasonally, is engaged in virtual year-round operations and the number of employees in the year-round complement is relatively substantial, the Employer's operations are deemed "cyclical" rather than "seasonal" and an immediate election will be directed. *The Baugh Chemical Company*, 150 NLRB 1034 (1965); *Aspen Skiing Corporation*, 143 NLRB 707 (1963).

With respect to the Employer's argument regarding a high turnover of employees, I note that although there is employee turnover throughout the year, the highest period of turnover occurs in August rather than in the winter or spring. Moreover, the current group of employees' rights must be considered as much as any speculative replacement employees and a significant number of them have expressed an immediate interest in deciding whether the Petitioner should

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[5]/ The Employer attempts to turn this principle on its head by arguing that any attempt to ascertain the number of employees to be eventually hired is speculative. It cites *Cooper International*, 205 NLRB 1057 (1973) in support of this assertion. In *Cooper*, the Board dismissed a union's petition for an election based on the employer's imminent relocation of its operations and the lack of evidence indicating that a considerable proportion of its existing employee complement would accept employment at the new facility. In the instant case there is no speculation involved in arriving at the conclusion that the number of employees currently employed is a representative and substantial portion of the group of employees *that the Employer's own witness* testified were forecast to be hired. Indeed, if the size of the workforce were to reach the number of employees that the Employer now speculates could conceivably be hired based upon last year's experience (i.e., 200 -- and that figure would include temporary employees excluded from the Unit), even in that event 100 percent of employee classifications currently exist and the size of the current work force is over half that figure. Thus, the current employees would comprise a substantial and representative complement of the unit workforce to be employed.

serve as their collective bargaining representative. Finally, since there is a high degree of turnover year round, such a consideration would result in an election never being able to encompass the same group of employees who might wind up being represented by the Petitioner, and the Board has held that high turnover of the work force is no reason to deny employees the right to self organization. *Swift & Company*, 111 NLRB 545, 546 (1955).

Based on the forgoing, I find that the Employer's current complement of employees is a substantial and representative complement of the unit workforce to be employed and I will order an immediate election.

B. The Part-Time Employees Issue:

There are currently no part-time employees. The Employer does not contemplate hiring any part-time employees. Since part-time employees do not exist, and apparently will not exist anytime in the foreseeable future, I will not include such an employee description in the unit. See, *International Brotherhood of Electrical Workers, Local No. 1081 (Utah Copper Division, Kennecott Copper Corporation),* 150 NLRB 2, 21 (1964) (Board declined to amend or clarify units to include certain classifications of truck drivers which did not exist); *Ivory Pine Company of California*, 107 NLRB 19, 21 at fn. 5 (1953) (Board declined to exclude "truckdrivers" as a classification since "a regular classification of truckdrivers [did] not exist . . . ."); *Cities Service Refining Corp*., 94 NLRB 1634, fn. 2 (1951) (Board declined to make determination on unit placement when no plans to fill classification in the immediate future).

Should the Employer ever implement a part-time employee classification and should an issue thereafter arise over such employees' inclusion in the Unit, a unit clarification petition could always be filed. This would result in a resolution of the issue at a time when there would be facts available for a considered, rather than a speculative, resolution of the issue.

Moreover, contrary to the assertions of the Petitioner, it appears that the Board often describes units without reference to any part-time employees when none exist. See, e.g., *Coplay Cement Co.,* 288 NLRB 66, 68 (1988); *Textprint Incorporated*, 253 NLRB 1101, 1103 (1981); *Witteman Steel Mills, Inc.,* 253 NLRB 320, 321 (1980). Labor organizations are also routinely certified as the bargaining representative of units which are so described. See, e.g., *Allen's Electric Company, Inc.*, 340 NLRB No. 119 (2003); *Cornell Forge Company*, 339 NLRB No. 85 (2003); *Shepherd Tissue, Inc.,* 326 NLRB 369 (1998).

Based on the forgoing, I have not included part-time employees in the unit description.

IV. SUPERVISORY EXCLUSIONS FROM THE UNIT

The parties agree, the record shows, and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Vice-President and General Manager Kevin Sheehan; Human Resources Manager Angie Schmitt; Distribution Manager Steve Schindler; Traffic Supervisor Jim Merritt; Distribution Supervisor Tom Burton; Production Manager James Smith; Production Planning Supervisor Gene Douglas; Assembly Supervisors Mike Hoffman and Todd Farrington; Inventory Manager Jake Haas; Manufacturing

Engineer Mark Szymanski; and Second Shift Supervisors Brian Lobb and Larken White. Accordingly, I will exclude them from the unit.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All assembly, distribution warehouse, inventory and quality control employees employed by the Employer at its Shepherdsville, Kentucky facility, but excluding office clerical employees, maintenance employees, employees employed through temporary agencies, and all professional employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which

commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **December 16, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club*

Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 23, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 9th day of December 2004.

/s/ Gary W. Muffley

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